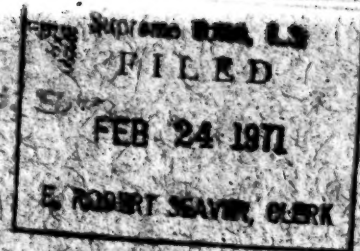


70-86



No.

~~1389~~

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, PETITIONER

v.

FORREST S. TUCKER

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case insofar as it remanded the cause for resentencing.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 431 F. 2d 1292.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on September 28, 1970. On December 19, 1970, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sentence imposed in 1953 must be vacated on the basis of a possibility that the sentencing judge took into account two prior convictions defective under the standards of *Gideon v. Wainwright*, 372 U.S. 335.

STATEMENT

In 1953 respondent was convicted of armed bank robbery in the United States District Court for the Northern District of California. The evidence against him included the testimony of four eyewitnesses and a fingerprint expert. Respondent testified in his own behalf that he was not in the vicinity of the savings and loan institution at the time of the robbery. On cross-examination government counsel elicited, for impeachment purposes, admissions of three prior state felony convictions—breaking and entering and theft of an automobile in Florida in 1938; burglary of a jewelry store in Louisiana in 1946; and armed robbery in Florida in 1950. Respondent also admitted escaping from a hospital en route to prison, after his 1950 sentence had commenced, and traveling to California under an assumed name.

Following the jury verdict, the court conducted a sentencing hearing. An FBI agent furnished information that respondent had been imprisoned for five years and four months on the 1938 conviction. The 1946 conviction brought a sentence of four years, but it was not known how much time was actually served. In 1950 respondent was sentenced to five years, but (as we have noted) escaped shortly after he began serv-

ice of that sentence. Other matters adduced at the sentencing hearing included respondent's marriage in September 1951; his background in Louisiana; the absence of verified gainful employment while in California; respondent's possession at the time of his arrest of a number of valuable assets, including an automobile and \$700-\$800 in cash; his wife's ignorance of his true identity and activities up until the time of his apprehension; his indictment in a pending state armed robbery case; and suspicions, informed by fingerprint evidence, that he had participated in several other local robberies involving finance companies or loan offices. Action in these last cases had been deferred pending the outcome of the present prosecution, and the court appears to have given them some weight in sentencing, App. A, *infra*, pp. 19-21; on the other hand, it stated that it would not take into consideration the armed robbery case already pending under indictment (Tr. 228).¹

In July 1968 respondent filed a motion to vacate his sentence under 28 U.S.C. 2255. Underlying his motion was a ruling by the Superior Court of Alameda County, California in 1966² that respondent's 1938

¹ We are lodging herewith a copy of the transcript of the 1953 trial and sentence proceedings.

² After respondent's federal conviction he was convicted in California on four counts of armed robbery. The 1938 and 1946 convictions were the basis for adjudging him an habitual criminal, thereby increasing his state sentence. More than 10 years later, shortly after this Court decided *Gideon v. Wainwright*, *supra*, respondent attacked the prior convictions in the state courts. In January, 1966 the Supreme Court of California ordered the Alameda County Court to redetermine re-

and 1946 convictions were defective under a retro-active application of *Gideon v. Wainwright*, 372 U.S. 335, because respondent had not been represented by counsel, and had not knowingly waived his right to counsel, at the trials which resulted in those convictions. The district court denied relief.

On appeal, the Court of Appeals for the Ninth Circuit concluded that there was error in the use of the prior convictions at trial and at sentencing. It went on to find that the use of the tainted convictions for impeachment at the trial was harmless beyond a reasonable doubt,³ and therefore affirmed the conviction. With respect to the sentencing, however, the court of appeals found a reasonable probability that the defective prior convictions contributed to the imposition of the maximum possible term of imprisonment. It therefore remanded the case to the district court for resentencing without consideration of the invalid convictions. 431 F. 2d 1292-1294. One judge dissented, characterizing as "pure speculation" the holding that the invalidated prior convictions could have had an effect on respondent's federal sentence, and stressing that whether or not the convictions were invalidated, the conduct upon which they were

spondent's status as an habitual criminal in light of *Gideon*. *In re Tucker*, 64 Cal. 2d 15, 409 P. 2d 921. After a hearing, the county court, on June 10, 1966, found the prior convictions defective, and withdrew the order decreeing appellant an habitual criminal (App. C).

³ The court found that there was ample other evidence discrediting respondent's testimony, as well as abundant evidence of guilt.

based was still proper for consideration in imposing sentence.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision is an unwarranted extension of this Court's decision in *Burgett v. Texas*, 389 U.S. 109. It places existing criminal sentences in doubt and portends a considerable expansion of Section 2255 proceedings to review sentencing issues. This presents an important question of federal law which has not been, but should be, decided by this Court.

Burgett involved a trial held after this Court's decision in *Gideon v. Wainwright*, 372 U.S. 335, under procedures permitting the prosecution to introduce evidence of prior convictions during trial in order to enhance sentence by proving recidivism. The prior conviction introduced in that case was constitutionally infirm, because the record of the conviction failed to satisfy the right-to-counsel standards recognized in *Gideon*. This Court reversed *Burgett's* conviction, finding the admission of his prior conviction "inherently prejudicial" and not harmless beyond a reasonable doubt.⁴ The crux of the holding lies in the Court's statement that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the prin-

⁴ The necessity for commenting upon the possibility of harmless error evidently resulted from the jury's fixing the defendant's sentence at ten years, fifteen less than the maximum even for a first conviction for the offense charged.

ciple of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115.

In this case, on the other hand, trial and sentencing occurred before this Court's decision in *Gideon*. Respondent's prior convictions were not used to prove either guilt or recidivism. As admitted in evidence to impeach, the defective prior convictions were correctly held to be of no consequence in the guilt-determining process. Cf. *Sigler v. Losieau*, 396 U.S. 988. In the sentencing process, they did not increase the maximum lawful punishment, but merely had an unassessable role as one of a number of factors considered by the trial judge in determining an appropriate sentence. In fact, the conduct underlying the prior convictions found defective below had been in effect admitted at the sentencing hearing.⁵ We do not believe that the principle of *Burgett* requires a sentence that was properly imposed in the pre-*Gideon* era to be disturbed on such tenuous grounds.

A sentencing judge has wide latitude in determining an appropriate sentence, and the sentence ordinarily is not to be disturbed by an appellate court as long as it is within statutory bounds. The judge is, of course, not limited to rules of evidence fashioned for criminal trials; he is entitled and indeed encouraged to consider information derived from sources whom

⁵ In a colloquy with the sentencing judge, respondent denied having committed only the last of the offenses underlying his three prior convictions (Tr. 229-230). He apparently was represented by counsel in the proceedings leading to that conviction.

the defendant has not necessarily confronted, as well as matter unrelated in any direct fashion to the crime upon which sentence is being imposed. *Williams v. New York*, 337 U.S. 241; *United States v. Onesti*, 411 F. 2d 783 (C.A. 7), certiorari denied, 396 U.S. 904; *United States v. Trigg*, 392 F. 2d 860 (C.A. 7), certiorari denied, 391 U.S. 961; *Cross v. United States*, 354 F. 2d 512 (C.A.D.C.); *Arruda v. United States*, No. 24900, C.A. 9, decided April 21, 1970, certiorari denied, October 12, 1970 (No. 225, this Term). The criminal record which a judge may consider for sentencing purposes has never been thought limited to final convictions.

Although an ably counseled defendant might succeed in having certain charges dropped and in restricting the public airing of remaining charges by entering a guilty plea, a sentencing court is not precluded from considering the serious nature of criminal activity underlying either the withdrawn counts or those upon which the guilty plea was accepted. Similarly, laws which bar prosecution for stale offenses do not preclude their subsequent consideration in future sentencing proceedings. See *United States v. Doyle*, 348 F. 2d 715, 721 (C.A. 2), certiorari denied, 382 U.S. 843; *United States v. Onesti*, *supra*; *United States v. Cifarelli*, 401 F. 2d 512 (C.A. 2), certiorari denied, 393 U.S. 987. In other words, it is the defendant's actual past conduct, not his court-proven criminal responsibility, that the court takes into consideration in setting punishment that will "fit the offender and not merely the crime." *Williams v. New York*, 337 U.S.

241, 247. The subjective nature of this judgment, its multi-faceted character, and the resulting difficulty in ascertaining the motives for judicial action are all recognized in the rules which narrowly confine appellate review of sentencing.

In the light of these well accepted considerations, we believe that the court below exceeded its appellate function in reexamining the sentencing process that took place some seventeen years ago in this case, in a search for considerations whose sentencing impact might, in a contemporary case, be affected by intervening developments in the law. The fact that so important a principle as that established in *Gideon* is perhaps involved does not diminish the applicability of the principle that appellate courts do not intrude themselves into the subtle decisional process by which trial judges determine sentences for defendants tried before them. It is evident that the fact that counsel was denied in a case tried many years ago does not indicate that the defendant was not guilty of the acts for which he was tried; as we have noted, the respondent in this case had in fact not denied his guilt in those cases at the sentencing hearing, and it is of course his commission of the prior acts and not his conviction for them that was the pertinent consideration in fixing the sentence that is now in question. Thus the issue here is very different from that which motivated the *Burgett* decision, which properly denied legal effect to a formal conviction of an uncounselled defendant. And we believe that the decision below threatens not only excessive appellate intrusion into

the sentencing process but also an improper expansion of collateral proceedings under 28 U.S.C. 2255 as a vehicle for reexamination of sentencing processes.

The gravity and recurrent nature of this issue cannot be minimized. The court of appeals' decision applies in large part to multiple offenders convicted of serious crimes, whose criminal records commenced long before 1963, when *Gideon* was decided. *E.g.*, *Olvera v. Beto*, 429 F. 2d 131 (C.A. 5); *Gilday v. Scafati*, 428 F. 2d 1027 (C.A. 1); *Braun v. Rhay*, 416 F. 2d 1055 (C.A. 9).⁶

Often, the pertinent records of such prior pre-*Gideon* proceedings are inadequate, and the personnel who could furnish the answers unavailable. In such a situation, the courts have increasingly invoked the principle that waiver of counsel will not be presumed, and have therefore granted relief in other contexts. *Oswald v. Crouse*, 420 F. 2d 373 (C.A. 10); *Schram v. Cupp*, 425 F. 2d 612 (C.A. 9); *Smith v. Lane*, 426 F. 2d 767 (C.A. 7). Extension of this unavoidable problem to a whole new class of collateral proceedings for the reconstruction of the past mental processes of sentencing judges is, we submit, an unwarranted disruption of the judicial process that is not required

⁶ In *Daegle v. Crouse*, 429 F. 2d 503 (C.A. 10), *Olvera v. Beto*, 429 F. 2d 131 (C.A. 5), *Haggard v. Tennessee*, 421 F. 2d 1384 (C.A. 6), and *Sabilosky v. Massachusetts*, 412 F. 2d 691 (C.A. 1), the federal courts declined to resolve the substantive claims and instead ordered the habeas corpus petitioners to exhaust their state remedies first. These federal decisions provide a clear indication that the issue presented here will also arise in state courts.

for the vindication of the *Gideon* principle. Certainly, if a prior conviction has been used neither to invoke a recidivist statute nor in some similar way to enlarge the formal bounds of sentencing, its validity should not be open to question in collateral proceedings against a second sentence that was entirely proper when imposed. Cf. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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FEBRUARY 1971.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 24839

FORREST S. TUCKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

(September 28, 1970)

*Appeal from the United States District Court for the
Northern District of California*

Before HANLEY and MERRILL, Circuit Judges, and
THOMPSON, District Judge¹

HANLEY, *Circuit Judge*: Forrest S. Tucker appeals from a district court order denying his motion, made under 28 U.S.C. § 2255, to vacate the judgment convicting him of armed robbery and to set aside the sentence based thereon. The judgment and sentence of imprisonment for twenty-five years, entered on May 20, 1953, was affirmed by this court in *Tucker v. United States*, 214 F. 2d 713 (9th Cir. 1954). The district court opinion now under review in this section 2255 proceeding is reported in 299 F. Supp. 1376 (N.D. Cal. 1969).

After Tucker had testified in his 1953 trial for the armed robbery, the Government introduced evidence of his three prior felony convictions. This evidence

¹ The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

was received for the purpose of impeaching Tucker's own testimony offering an alibi defense. In addition, after the jury had entered its verdict of guilty, the trial judge called for further information, in the form of a Federal Bureau of Investigation report concerning Tucker's prior convictions, for use in determining the sentence to be imposed.

On June 10, 1966, the Superior Court of Alameda County, California, in case No. 25,174, set aside two of Tucker's prior convictions on the ground that "the defendant was neither advised of his rights to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel." The Government concedes that these two prior felony convictions were invalid under *Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963).

In this section 2255 proceeding Tucker argues that his 1953 conviction is invalid, under the rule of *Burgett v. Texas*, 389 U.S. 109, 115 (1967), because his prior uncounseled convictions were used at his trial to impeach his credibility and to influence the court in imposing sentence.

In *Burgett*, the Supreme Court stated that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." 389 U.S. at 115.

This rule is being applied retroactively by this court and other court of appeals which have had occasion to consider the problem.²

² See *Tucker v. Craven*, 421 F. 2d 139 (9th Cir. 1970); *Gilday v. Scafati*, — F. 2d — (1st Cir. 1970); *Smith v. Crouse*, 420 F. 2d 373 (10th Cir. 1969); *Losieau v. Siegler*, 406 F. 2d 795 (8th Cir. 1969); *Williams v. Coiner*, 392 F. 2d 210 (4th Cir. 1968). The *Gilday* opinion contains a good statement of the reasons why *Burgett* should be applied retroactively.

The *Burgett* rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness. *Gilday v. Scafati*, F. 2d (1st Cir. 1970).³

We are also in agreement with the further ruling in *Gilday*, for the reasons there stated, that the reception of evidence pertaining to prior convictions, constitutionally erroneous under *Burgett* may, under the circumstances of a particular case, be harmless beyond a reasonable doubt, applying the principle announced in *Chapman v. California*, 386 U.S. 18, 24 (1967). Under *Chapman*, an error of constitutional proportions can be disregarded as harmless if the prosecution proves beyond a reasonable doubt that the error "did not contribute to the verdict obtained." 386 U.S. at 24.⁴

The nature of defendant's testimony at the trial, and the overwhelming weight of the testimony to the contrary are fully described in the district court opinion, 299 F. Supp. 1376, at 1377-1378. We agree with the district court that defendant's testimony was completely discredited by evidence other than that per-

³ The question of whether *Burgett* precludes use of a prior conviction, invalid under *Gideon v. Wainwright*, to impeach a defendant's testimony in a subsequent trial on another charge, was argued in this court in *Shorter v. United States*, 412 F. 2d 428 (9th Cir. 1969). However, in that case we did not decide the question because it was the defendant, and not the prosecution, who offered the evidence pertaining to a prior conviction.

⁴ The *Chapman* court stated that there is little, if any, difference between this statement of the governing principle, and the statement in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) that "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." See also, *Harrington v. California*, 395 U.S. 250 (1969).

taining to the prior convictions. This leads us to conclude that the prosecution firmly proved that the evidence of prior convictions did not contribute to the verdict obtained and that, with respect to the verdict of guilty, the error in receiving such evidence was therefore harmless beyond a reasonable doubt.

As noted above, the evidence pertaining to Tucker's prior convictions was submitted not only to affect his credibility as a witness, but also to assist the trial court in fixing the sentence. The twenty-five year prison sentence imposed following Tucker's conviction for armed robbery, in violation of 18 U.S.C. § 2113(a) and (d), was the maximum allowable under the statute.

There is a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed. Therefore, as to the sentencing, we are unable to conclude that the reception of such evidence was harmless beyond a reasonable doubt.

Accordingly, the judgement of conviction is affirmed, but the cause is remanded to the district court for resentencing without consideration of any prior convictions which are invalid under *Gideon v. Wainwright*, 372 U.S. 335 (1963).

THOMPSON, D.J., Dissenting:

I respectfully dissent. This Court has not yet held that the rule of *Burgett v. Texas*, 389 U.S. 109 (1967), is applicable to constitutionally infirm convictions used for impeachment. This is the case in which it should be declared that a convicted person cannot attack his conviction on the ground that a constitutionally infirm prior conviction was used for impeachment. This Court has not yet held that the rule of *Burgett v. Texas*, *supra*, applies to invalidate a sentence where a constitutionally infirm prior conviction was called

to the attention of the sentencing judge by pre-sentence report, or otherwise, before sentence was imposed. This is the case in which it should be declared that a convicted defendant cannot attack the sentence imposed by showing that the sentencing judge was informed about a constitutionally infirm prior conviction.

This writer cannot believe that the Supreme Court intended such a broad interpretation and application of the *Burgett* rule. Viewed realistically, it means that the most hoary and ancient of the confirmed, repetitive recidivists may, by applying the "domino theory" whereby the earliest of the convictions is declared void by application of *Gideon*,¹ fell each of the ensuing convictions and establish a clean unsullied record of pro-social conduct.

It has been a fundamental of our case-made jurisprudence that the principles announced in pertinent precedent should be viewed and interpreted in the light of the facts of the particular case. This is a salutary principle which this writer believes has not been entirely abandoned in contemporary jurisprudence. The principle recognizes the problems inherent in communication and expression, the difficulties of achieving pinpoint accuracy and the non-existence of words expressing exactly the same concept for the writer and the reader, the speaker and the listener. It recognizes the human frailty of inability to conceive, imagine and anticipate the applications which will be sought to be made of an announced principle, howsoever accurately expressed with semantic exactness. The principle also recognizes that judges are human beings and writing in favor of a position taken, however dispassionately, may become somewhat polemic in sup-

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

porting the soundness of the decision advocated. This writer admires the genius of our system which contemplates a case by case review under differing sets of facts of the principles formulated and articulated in earlier precedents.

The majority opinion is based upon the following quotation from *Burgett v. Texas*, *supra*.

To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer v. Beto*, 384 U.S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

The majority relies upon *Gilday v. Scafati*, — F. 2d — (1st Cir. 1970), where the First Circuit said:

We conclude that the Burgett rule against use of uncounselled convictions "to prove guilt" was intended to prohibit their use "to impeach credibility," for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt. Moreover, such use compounds the original denial of the constitutional right just as surely as does use "to prove guilt or enhance punishment." Finally, defendant's privilege to testify or not to testify—*Griffin v. California*, 380 U.S. 609, 614 (1965)—is seriously impaired if the price of testifying is the potential admission of invalid and possibly unreliable convictions which could not otherwise be

admitted. We therefore hold that *Burgett* prevent the use of uncounseled convictions for purposes of impeachment.

I think the First Circuit and the majority of this Court rely on a too literal reading of the *Burgett* opinion in disregard of the principle I have urged that we should look to the facts and to what actually was decided. Narrowly, the holding of the *Burgett* case is that if void prior convictions are brought to the attention of the jury by the prosecution in a one-stage recidivist trial, the result is a denial of due process. In that situation, inasmuch as the enhancement of punishment is directly dependent upon the validity of the prior conviction, it is the absolute duty of the prosecution to assure itself of that validity.

My interpretation of *Burgett* is that the words "support guilt" refer to the situation where the prior conviction is an essential element of the crime charged. For examples, under federal law, it is unlawful for a felon to transport a firearm in interstate commerce (18 U.S.C. § 922) and under California law, it is an offense for a felon to come upon the grounds of a reformatory in the nighttime (CPC § 171(b)). In such cases, the status or condition of having suffered the prior felony conviction is essential to support the conviction and the prosecution, quite properly, is not permitted to rely upon a void conviction to establish such status. And when the prior conviction is "used against a person * * * to enhance punishment for another offense," the Supreme Court, in my view, was alluding to recidivist statutes like the one involved in *Burgett* and like the Narcotics Drug Import and Export Act (21 U.S.C. § 174) and like the California Habitual Criminal Statute (CPC § 644). This is as far as I would now go in the application of *Burgett*,

reserving, nevertheless, deference to the policy that it is worthwhile to consider future applications of the principle on a case-by-case basis.

In the present case, two prior felony convictions were used to impeach defendant at his federal armed robbery trial. These later turned out to be vulnerable under the *Gideon* principle. It is my thesis that this fact does not justify or support an attack upon the federal conviction. It seems to me that the position of the Majority. "[T]he Burgett rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness," constitutes an unwarranted extension of the *Burgett* decision and will involve state and federal courts in a morass of fruitless inquiry into the undiscernable prejudicial effect of such impeachment upon the trial as a whole. Further, the majority *sub silentio* overrules two decisions of this Court, *Bloch v. United States*, 238 F. 2d 631 (1956), and *Bloch v. United States*, 226 F. 2d 185 (1955), where the Court, in the first opinion, saw no error in a felony impeachment question asked by a prosecutor who knew the prior conviction was on appeal, and in the second affirmed the ruling despite the fact that the prior conviction had been reversed on appeal. Our Court there recognized that what really was in issue was the good faith of the prosecutor and that his use in good faith of a vulnerable prior conviction to impeach the defendant could not be relied upon to reverse the conviction. The same principle should be followed in the present case.

Moreover, I see no federal constitutional problem where the issue is properly analyzed as one of the prosecutor's good faith.

On the question of sentence, the factors involved are even more imponderable. The majority thinks the

imposition of the maximum sentence shows that the priors were used to enhance sentence. In my experience, so many factors affect the imposition of sentence that I cannot accept the premise. There never will be a case where a post-conviction remedy court will be able to tell whether knowledge of one or more prior convictions affected the sentence unless the sentence given was mandated by statute so that the prior record could have no effect. In the present case, the sentencing judge conducted an extensive colloquy before imposing sentence. A portion is copied in the margin.² There is more, but it seems to me to be a

² "The COURT. How old were you when you first suffered a conviction—17?

"The DEFENDANT. Yes, sir.

"The COURT. These cases carry heavy penalties. You knew that when you started these enterprises, didn't you?

"The DEFENDANT. I understand it does carry a heavy penalty.

"The COURT. Do you know the reason underlying it?

"The DEFENDANT. Yes, sir.

"The COURT. There is no room for the Court to entertain elements of great sympathy because you were armed on the occasion in question and you probably would have shot, had the occasion arose.

"The DEFENDANT. I have never been known to strike anybody, shoot anybody or harm anybody.

"Mr. KARESH. Could I ask the agent a question? Is there any evidence of violence in the past criminal record—I don't mean the bank robberies—any of these larcenies that you know of?

"The WITNESS. No, there is no actual shooting or anything of that nature.

"The COURT. How long has this association with Rick Bellew been going on, since 1951 and '52?

"The WITNESS. That would be my impression, but I believe they probably met first in the Louisiana penitentiary. Now then at the time that I interviewed Tucker, he told me that he first met Bellew in 1938, out here in California, and naturally later when we found out that he had served—he was

fair analysis that the sentencing judge was influenced primarily by defendant's proneness to violence and the number of other outstanding charges than anything

serving a sentence down there, that that probably was not the truth, and I would say that after he left the Louisiana penitentiary, he probably did not see Bellew again until somewhere in December of 1950 or January of '51, because prior to that, Bellew was incarcerated in the California penitentiary. I believe that he was paroled out of the penitentiary somewhere around the latter part of 1950, and since that time I would say that he has associated with Bellew—but just how much, or whether it was social or just along with these various activities, I couldn't say.

"The COURT. Without disclosing whatever evidentiary matter might be at hand, does the defendant appear to be linked in more than several local felonies involving banks or loan companies?

"The WITNESS. I would say this, that on the local loan companies in the Oakland Area—

"The COURT. What kind of loan companies are they?

"The WITNESS. Well, they are like the Personal Finance Company, Guarantee Finance Company, loan companies of that nature. And I would say that the evidence against him is very similar, in effect, of what was presented here, on those particular cases.

"The COURT. Do [you] have fingerprint testimony and the like?

"The WITNESS. I believe that there is, yes.

"The COURT. I take it you do not present these cases—you did not present these cases until you determined the fate of this particular case, is that the problem involved?

"The WITNESS. Well, these particular cases I am talking about are local—they are under the jurisdiction of the local police department and there is no Federal jurisdiction. Now I understand the District Attorney's office in Alameda County is waiting. What action they are going to take, I don't know.

"The COURT. I assume that whatever sentence is meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases.

else.³ It is not uncommon in my experience for a sentencing judge to take into consideration other charges pending (many times detainers have been placed for them) in enhancement of punishment and for other prosecuting officials to drop charges if a sufficiently substantial sentence is imposed. It is not even unusual for a defendant against whom a number of detainers have been lodged to request a substantial sentence with the hope that the other charges will be dropped. On the present record, it is pure speculation that the invalidated prior convictions had an effect on the sentence.

"The WITNESS. I believe so.

"The COURT. All right. Do you have anything further?

"Mr. KARESH. No, Your Honor. Perhaps just one remark, that he did not strike anyone or shoot, did not hit anyone.

"The COURT. There is one count in the indictment?

"Mr. KARESH. Yes, Your Honor.

"The COURT. Under which the defendant Forrest Silva Tucker has been found guilty. The Jury in its Findings has indicated that the defendant did knowingly, willfully and unlawfully put in jeopardy the lives of the aforementioned employees of the Loan Association by the use of a dangerous weapon, to wit, a hand gun. Under such circumstances, Subdivision 2113(d) is applicable, providing for the term of 25 years.

"Accordingly, Forrest Silva Tucker, are you ready for sentence?

"The DEFENDANT. I am.

"The COURT. It is the judgment and sentence of this Court that you will be confined in a Federal penitentiary for the term of 25 years.

"That is all."

³ My quotation from the sentencing colloquy is not to suggest that I think this post-conviction remedy court has a problem which warrants trying to dissect the mind of the sentencing judge. I merely wish to picture the kind of swamp we are getting ourselves bogged down in.

Finally, I would like to suggest that when we consider the use of prior convictions for impeachment or when they are included in a pre-sentence presentation as part of the defendant's prior history, it is not the conviction—the formality of conviction—that is important. It is the conduct that is represented by the conviction. The witness' veracity is not impeached by the conviction. The conviction is only shorthand for the impeaching misconduct, and a rule of convenience has been adopted which permits impeachment by the shorthand method but prohibits it by showing other acts of misconduct; else the trial would be led into endless by-ways and side controversies. Invalidating the prior conviction does not erase the conduct on which it was based. This is even clearer in the field of sentencing where a competent presentence report does not simply recite the prior criminal record but describes the circumstances of each charge—even those that led to an acquittal. It is this history that influences the sentencing judge, not the formal convictions. For example, in a recent case the defendant had been acquitted of the charge of murdering his mother. It, nevertheless, was proper for the sentencing judge to consider that incident where a loaded weapon was involved as bearing on defendant's proneness to violent activity. And in the present case, the judge took into consideration conduct which had not yet been prosecuted to conviction—showing that it is the conduct, not the conviction, which is relevant. Many times the circumstances of a prior conviction will cause a court to discount and disregard it completely in imposing sentence.

These are additional reasons in support of my conclusion that the *Burgett* rule should be applied only where the formal record of conviction of a felony is essential to support guilt or to enhance punishment.

In the context of the foregoing, perhaps my earlier statement that the majority relies on a too literal reading of the quotation was incorrect. There the emphasis was on "support guilt" and "enhance punishment." But if the statement of principle in *Burgett* is read with strict literalness and the emphasis is placed on "to permit a conviction * * * to be used," then my conclusion, that it is the required use of the formal record of conviction to attain the result under attack that is important, is clearly correct.

The majority's treatment of the problems in this appeal is based on the necessary assumption that a federal constitutional issue of fair trial and due process of law is present whenever a jury or court is informed about a defendant's prior criminal record. Yet the decisions of the Supreme Court specifically refute this assumption: *Spencer v. Texas*,⁴ 385 U.S. 554 (1967), where the procedure of a one-stage recidivist trial was affirmed; *Rundle v. Johnson*, 386 U.S. 14 (1967), where the procedure of admission of prior crimes in a one-stage murder trial to assist the jury in fixing punishment was affirmed. These decisions, viewed in association with *Burgett*, suggest that the broad application of the *Burgett* rule to impeach-

⁴"It is contended nonetheless that in this instance the Due Process Clause of the Fourteenth Amendment requires the exclusion of prejudicial evidence of prior convictions even though limiting instructions are given and even though a valid state purpose—enforcement of the habitual-offender statute—is served. We recognize that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes, in that other procedures for applying enhancement-of-sentence statutes may be available to the State that are not suited in the other situations in which such evidence is introduced. We do not think that this distinction should lead to a different constitutional result."

ment evidence and sentencing information is not warranted and not intended. Cf. *United States v. Fay*, 409 F. 2d 564 (2nd Cir. 1969). While reference to dissenting opinions in support of a contention is apt to invoke ridicule, I believe the succinct dissent of three Justices in *Burgett v. Texas*, 389 U.S. 109 at 120, to be pertinent:

The record in this case shows no prosecutorial bad faith or intentional misconduct. To the extent that the prosecutor contemplated the use of prior convictions in a one-stage recidivist trial, his right to do so is of course established by *Spencer v. Texas*, 385 U.S. 554, decided only last Term. The fact that the prior convictions turned out to be inadmissible for other reasons involves at the most a later corrected trial error in the admission of evidence. We do not sit as a court of errors and appeals in state cases, and I would affirm the judgment of the state court.

This approach to the problem is reminiscent of the attitude of our Court in the *Bloch* cases, *supra*, although it was rejected by the majority of the Supreme Court in a true recidivist trial where the void prior conviction was an essential of the prosecutor's case, may nevertheless be revived to control judicial review in peripheral applications of the *Burgett* rule like the uses of it in this case.

I would affirm the District Court.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 24839

FORREST S. TUCKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

JUDGEMENT

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Filed and entered Sept. 28, 1970.

APPENDIX C

In the Superior Court of the State of California in
and for the County of Alameda

Dept. No. 2; No. 25174

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

FORREST SILVA TUCKER, DEFENDANT

FINDINGS AND JUDGMENT OF COURT

On June 10, 1966 a hearing having been had before the above-entitled Court without a jury and evidence having been received as to the first prior conviction contained in the indictment, to wit, that on or about August 9, 1938 in the Circuit Court, Dade County, Florida, defendant was convicted of the felony of grand larceny and that in pursuance of said conviction served a term in a penal institution, and as the second prior conviction contained in the indictment, to wit, that on or about November 22, 1946 in the District Court, Orleans County, Louisiana, defendant was convicted of the felony of burglary and that in pursuance of said conviction served a term in a penal institution.

The Court hereby finds as to said first prior conviction and as to said second prior conviction that said Forrest Silva Tucker was not then and there informed of his right to the assistance of counsel and that said Forrest Silva Tucker did not then and there effectively waive his constitutional right to be represented by counsel.

Now THEREFORE, it is ordered adjudged and decreed that the verdicts of the jury in the above-entitled cause filed on November 27, 1953 finding said first prior conviction and said second prior conviction to be true are vacated and set aside and said prior convictions contained in the indictment are dismissed.

It is further ordered, adjudged and decreed that the adjudication of December 2, 1953 that the above-named defendant is an habitual criminal under subdivision a of Section 644 of the Penal Code of the State of California be and it is hereby set aside; said judgment of December 2, 1953, as modified by the District Court of Appeal of the State of California in and for the First Appellate District, Division Two thereof (People vs Forrest Silva Tucker: 127 Cal. App. 2d 436), shall otherwise remain in full force and effect.

Dated: June 10, 1966.

LEONARD DUDER,
Judge of the Superior Court.